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Joinder & Severance of Defendants

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This article discusses joinder and severance of defendants. A subsequent article examines the joinder and severance of offenses. See generally 2 Katz & Giannelli, Baldwin's Ohio Practice Criminal Law ch. 58 (1996).

Criminal Rule 8 governs joinder of defendants in one indictment, information, or complaint. Rule 13 governs the consolidation for trial of defendants when there is more than one indictment, information, or complaint. Finally, Rule 14 governs severance of defendants. The importance of joinder cannot be overestimated. As one commentator has noted:

> The way in which the prosecutor chooses to combine offenses or defendants in a single indictment is perhaps second in importance only to his decision to prosecute. Whether a defendant is tried en masse with many other participants in an alleged crime, or in a separate trial of his own, will often be decisive of the outcome. Equally decisive may be the number of offenses which are cumulated against a single defendant, particularly if they are unconnected. 8 Moore's Federal Practice 8-3 (Cipes ed. 1993).

JOINDER OF DEFENDANTS: RULE 8(B)

Criminal Rule 8(B) provides that defendants may be prosecuted under the same indictment, information, or complaint if they are alleged to have participated (1) in the same criminal act, transaction, or series of acts or transactions, or (2) in the same course of criminal conduct. The Rule further specifies that these defendants may be charged in each count separately or together and that all of the joined defendants need not be charged in each count.

Joinder of Offenses

Rule 8(B) differs from Rule 8(A), which governs joinder of offenses, in one important respect. Rule 8(A) permits the joinder of offenses that "are of the same or similar character." A comparable provision relating to the joinder of defendants does not appear in Rule 8(B); defendants may be tried together only if they are alleged to have participated (1) in the same acts or transactions or (2) in the same course of criminal conduct. Moreover, Rules 8(A) and 8(B) operate independently of each other. Thus, if X has committed one robbery by himself and a second robbery with Y, all charges cannot be tried at one time because Y did not participate in the first robbery. The prosecutor could try X alone for both robberies by joining offenses under Rule 8(A), in which case Y would be tried separately for the second robbery. Alternatively, X and Y could be tried jointly under Rule 8(B) for the second robbery, in which case X would be tried alone for the first robbery.

MULTIPLE INDICTMENTS & COMPLAINTS: RULE 13

As discussed above, Rule 8(B) prescribes tests for joinder in a single indictment, information, or complaint. Criminal Rule 13 governs joinder where there is more than one indictment, information, or complaint.

Rule 13 is broken into two paragraphs which are almost identical in wording. The first paragraph authorizes the court to order "two or more indictments or informations or both to be tried together." Paragraph two provides the same procedure for combining multiple complaints for misdemeanors in courts of inferior jurisdiction. In each, consolidation is permissive and authorized only if the defendants could have been joined in a single indictment or information (paragraph one) or in a single complaint (paragraph two). The tests for determining whether joinder of defendants is proper are found in Rule 8(B).

The final provision of both paragraph one and two requires that the procedure be the "same as if the prosecution were under a single indictment, information, [or complaint]." "Procedure" is not defined. Presumably, it refers to mechanical aspects of trial such as the number of peremptory challenges.

SEVERANCE: RULE 14

Criminal Rule 14 provides that when two or more defendants have been properly joined in an indictment, information, or complaint pursuant to Rule 8(B) and it appears that the defendant or the state is prejudiced by the joinder, the court may grant severance of defendants or provide appropriate relief.

The decision to grant severance falls within the trial

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court's discretion. As one court stated,

> It is axiomatic that the granting of separate trials for codefendants is a matter for the discretion of the trial judge .... Absent some abuse of discretion, to be demonstrated by a clear showing of prejudice and the consequent denial of a fair trial, the determination is not subject to reversal. State v. Perod, 15 Ohio App.2d 115, 120, 239 N.E.2d 100 (1968).

See also Zafiro v. United States, 506 U.S. 534, 541 (1993) ("Rule 14 leaves the determination of risk of prejudice and any remedy that may be necessary to the sound discretion of the district courts.").

In this context, prejudice may arise in different circumstances: (1) where a defendant wants to call a codefendant as a witness, (2) where two defendants have antagonistic defenses, (3) where the danger of guilt by association is present, (4) where the complexity of the case may make it difficult for the jury to separate the evidence for each defendant, and (5) where a codefendant's confession implicating the defendant is offered at trial. These circumstances are discussed below. They are not, however, exhaustive.

CODEFENDANT'S TESTIMONY

In some cases a defendant has been prejudiced because a joint trial precluded the calling of codefendants who could have provided exculpatory evidence. A leading case is United States v. Echeles, 352 F.2d 892, 898 (7th Cir. 1965), in which the defendant was charged with suborning perjury, impeding the administration of justice, and conspiracy. Echeles's codefendant had previously testified in another trial that Echeles was not involved in the events upon which the present charges were based. Echeles moved for a severance so that the codefendant would testify in his behalf. The trial court denied the motion; the Seventh Circuit reversed. Under the circumstances of the case, the court found that (1) the trial court could have ordered the codefendant tried first, and (2) Echeles "should not be foreclosed of the possibility that [the codefendant] would testify in his behalf" merely because the codefendant might claim his Fifth Amendment privilege even if separate trials were ordered.

The burden is significant in this respect: the defendant must specify not only that the codefendant will be called as a witness but also the purpose sought by calling the codefendant. A mere allegation that the defendant contemplates calling a codefendant is insufficient. See State v. Perod, 15 Ohio App.2d 115, 239 N.E.2d 100 (1968) (any prejudice resulting from a joint trial is merely speculative). Thus, counsel should disclose the exculpatory effect of the codefendant's anticipated testimony as well as the basis for believing why the codefendant would testify if severance is granted. Where an appellant in his motion for severance states, however, that each defendant might decide to call the other as a witness, but does not, such a ground is purely hypothetical and fails to establish actual prejudice. State v. Warren, No. 86AP-127 (10th Dist. Ct. App., 10-9-86).

ANTAGONISTIC DEFENSES

Severance may be sought where there are conflicting defenses and strategies. See 2 LaFave & Israel, Criminal Procedure § 17.3 (1985). "[I]t has long been the view that defendants joined for trial should be granted a severance whenever their defenses are antagonistic to each other." ABA Standards Relating to Joinder and Severance 41 (1968). One court of appeals has defined an antagonistic defense as one in which a defendant seeks to exculpate himself by blaming his codefendant. State v. Daniels, 92 Ohio App.3d 473, 636 N.E.2d 336 (1993). Conflicting defenses, however, do not necessarily mandate severance.

The problem presented by antagonistic defenses is illustrated by DeLuna v. United States, 308 F.2d 140, 143 (5th Cir. 1962), in which two defendants were tried jointly for narcotics offenses. One of the defendants, Gomez, moved for severance prior to trial, but the motion was denied. Although the second defendant, DeLuna, did not testify at trial, Gomez took the stand and blamed DeLuna for the offense. In closing argument, Gomez's counsel commented that "at least one man was honest enough and had courage enough to take the stand and subject himself to cross-examination .... You haven't heard a word from [DeLuna]." This tactic apparently worked — Gomez was acquitted and DeLuna convicted. On appeal, the Fifth Circuit reversed. The court believed that Gomez's attorney had acted properly; "his attorney should be free to draw all rational inferences from the failure of a codefendant to testify, just as an attorney is free to comment on the effect of any interested party's failure to produce material evidence in his possession or to call witnesses who have knowledge of pertinent facts." Nevertheless, from DeLuna's perspective, the comments prejudiced the exercise of his Fifth Amendment right to remain silent. This conflict could have been avoided; the court noted, "for each of the defendants to see the face of Justice they must be tried separately." DeLuna v. United States, 308 F.2d 140, 155 (5th Cir. 1962).

Other examples of antagonistic defenses include: People v. Hurst, 396 Mich. 1, 9, 238 N.W.2d 6, 10 (1976) (joint trial improper because one defendant "would testify to exculpate herself and incriminate [the other]"); Murray v. State, 528 P.2d 739, 740 (Okla. Crim. 1974) ("Denial of a severance in the instant case resulted in pitting defendant against co-defendant."); People v. Braune, 363 Ill. 551, 557, 2 N.E.2d 839, 842 (1936) ("Any set of circumstances which is sufficient to deprive a defendant of a fair trial if tried jointly with another is sufficient to require a separate trial.").

In State v. Parsons, 18 Ohio App.2d 123, 124 n. 22, 47 N.E.2d 482 (1969), the court of appeals observed: "[I]t is easy to imagine further complications in a consolidated trial. For example, suppose one defendant takes the stand and the other does not. Is the failure to testify subject to comment by the lawyer for the testifying codefendant?" Although the court did not have to answer this question to decide that case, it did give some inkling as to how it would have decided the issue when it stated: "This court unanimously disapproves the consolidation as not consonant with good practice in criminal trials." Id. at 123.

In Zafiro v. United States, 506 U.S. 543 (1993), the United States Supreme Court held that a severance was not required merely because antagonistic defenses are raised. Charged with distributing drugs, Zafiro claimed that she was merely the girlfriend of Martinez, another defendant, and knew nothing of the drugs. Martinez argued that he was merely visiting his girlfriend, Zafiro, and had no idea that she was involved in distributing drugs. The Court wrote: "There is a preference in the federal system for joint trials of defendants who are indicted together. Joint trials 'play a vital role in the criminal justice system.' They promote efficiency and 'serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.'" Id. at 539 (citing Richardson v. Marsh, 481 U.S. 200, 209 (1987)). The Court went on to hold:

Mutually antagonistic defenses are not prejudicial per se. Moreover, Rule 14 does not require severance even if prejudice is shown; rather it leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion . . . .

[W]hen defendants properly have been joined under Rule 8(b), a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence. Such a risk might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant. Id. at 538-39.

As examples, the Court cited cases where a codefendant's wrongdoing could lead a jury to convict the defendant, a complex case with markedly different degrees of culpability, Kotteakos v. United States, 328 U.S. 750 (1946), or where a codefendant's confession implicated the defendant. Bruton v. United States, 391 U.S. 123, 135-36 (1968).

In sum, severance is required only if a trial right is involved or there is a risk of an unreliable verdict. In addition, "less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice" and "defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials." Zafiro v. United States, 506 U.S. 534, 539 (1993).

Furthermore, mere hostility between defendants is not enough to necessitate separate trials. In deciding whether to grant a severance, the trial judge must balance the possible prejudice to the defendant against the government's interest in judicial economy and must consider ways in which the prejudice can be lessened by other means. See State v. Brooks, No. 9190 (2d Dist. Ct. App., 6-4-87). Nor is the simple assertion of different defenses enough to necessitate separate trials. A murder defendant who intends to raise an alibi defense which would make his case different from his codefendant's does not establish prejudice resulting from a denial of severance where the defendant does not assert the alibi defense at trial. State v. Robles, 65 Ohio App.3d 104, 583 N.E.2d 318 (1989).

GUILT BY ASSOCIATION

In some cases the accumulation of evidence against one defendant may spill over on other defendants, resulting in a conviction of the latter even though the evidence against that defendant is weak or marginal — in short, guilt by association. "By a joint trial of such separate offenses, a subtle bond is likely to be created between the several defendants though they have never met nor acted in unison; prejudice within the meaning of Rule 14 is implicit." Shaffer v. United States, 362 U.S. 511, 532 (1960) (Douglas, J., dissenting). The issue is whether the evidence as to each defendant is direct and uncomplicated and the jury is capable of segregating the proof as to each defendant. State v. Parker, 72 Ohio App.3d 456, 594 N.E.2d 1033 (1991).

In United States v. Kelly, 349 F.2d 720, 756 (2d Cir. 1965) (citing Fed. R. 14), cert. denied, 384 U.S. 947 (1966), the Second Circuit reversed a conviction on this ground, commenting that severance should have been granted "the moment it appeared that [the defendant] was likely to be prejudiced by the accumulation of evidence of wrongdoing by his codefendant."

Similarly, in United States v. Mardian, 546 F.2d 973, 977 (D.C. Cir. 1976), one of the Watergate defendants was tried along with Haldeman, Ehrlichman, and Mitchell. His alleged participation in the Watergate coverup was minor compared to that of the more well-known codefendants. On appeal, the D.C. Circuit reversed because Mardian's motion to sever was not granted. The court commented: "Particularly where there is a great disparity in the weight of the evidence, strongly establishing the guilt of some defendants, the danger persists that guilt will improperly 'rub off' on the others."

In contrast, where an appellant argued in support of his motion for severance that his codefendant's criminal record would probably be introduced during the trial and would prejudice the jury against him, such an argument does not affirmatively show that appellant will be prejudiced by the joint trial. State v. Dozanti, No. 1640 (11th Dist. Ct. App., 11-21-86).

COMPLEXITY

Where the number of charges and defendants is so numerous that the jury will be incapable of distinguishing the evidence and applying the law to each defendant separately, a severance should be granted. "When many defendants are tried together in a complex case and they have markedly different degrees of culpability, this risk of prejudice is heightened." Zafiro v. United States, 506 U.S. 534, 539 (1993) (citing Kotteakos v. United States, 328 U.S. 750, 774-75 (1946)).

United States v. Moreton, 25 F.R.D. 262, 263 (W.D.N.Y. 1960), illustrates this problem. The trial court granted a severance, stating:

The complex involvement of the various defendants and the multiplicity of charges contained in the indictment would render it difficult, if not impossible, for the court to adequately charge a jury as to the applicable law with respect to each defendant and for the jury to apply that law intelligently in reaching verdicts on the many charges involved.

City of Cincinnati v. Reichman, 27 Ohio App.2d 125, 272 N.E.2d 904 (1974), also illustrates this point. The defendant was charged along with three others for disorderly conduct but was not charged, as were the other codefendants, with aiding and abetting. All charges arose out of a civil protest. The trial court denied defendant's motion for a separate trial, which the appellate court concluded was an abuse of discretion. The transcript of testimony was 1,291 pages; photographs were received in evidence depicting scenes of many individuals and groups of individuals which had no relationship to the defendant's charge of disorderly conduct. The appellate court determined that the jury would have great difficulty in determining which portion of the evidence applied to the individual charge against the defendant.

See also State v. Parker, 72 Ohio App.3d 456, 594 N.E.2d 1033 (1991) (where evidence relevant to each of three co-defendants is direct and uncomplicated, so that the jury is capable of segregating the proof as to each defendant, the trial court's failure to sever defendant's trial was not error; moreover, defendant's testimony that he was left uncertain as to whether he should testify at a joint trial failed to establish that non-severance prejudiced his rights because all defendant has asserted is that better trial tactics existed if the trial was severed), dismissed, jurisdictional motion overruled, 61 Ohio St.3d 1418, 574 N.E.2d 1090 (1991).

CODEFENDANT'S CONFESSION (BRUTON RULE)

In Bruton v. United States, 391 U.S. 123 (1968), the prosecution in a joint trial sought to introduce the confession of one defendant, which inculpated Bruton, another defendant. The government contended that a limiting instruction directing the jury not to use the confession against Bruton provided sufficient protection. The United States Supreme Court, however, found the limiting instruction inadequate. According to the Court,

> there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored .... Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Id. at 135-36

Since the Court found the instruction ineffective and the accomplice did not take the stand, the Court ruled that Bruton had been denied the Sixth Amendment right of confrontation because the right to cross-examine the codefendant about the statement had been foreclosed. In Roberts v. Russell, 392 U.S. 293 (1968), the *Bruton* principle was made applicable to the states. See also State v. Moritz, 63 Ohio St.2d 150, 407 N.E.2d 1268 (1980).

The Ohio courts had addressed this issue prior to *Bruton*. The court of appeals recognized as long ago as 1942 that the general rule is "that where one of several defendants jointly indicted has made admissions or confessions implicating others, a severance should be ordered unless the attorney for the state declares that such admissions or confessions will not be offered in evidence on the trial." State v. Shafer, 71 Ohio App. 1, 7, 47 N.E.2d 669 (1942). Similarly, in State v. Rosen, 151 Ohio St. 339, 342, 86 N.E.2d 24 (1949), the Ohio Supreme Court referred to the "prejudicial effect" of such a confession on the defendant as constituting good cause under the severance statute. After noting that limiting instructions are often ineffective in these situations, the Court found that the "prejudicial matter should be stricken out or deleted before the confession is admitted in evidence."

The Ohio rule stated in *Rosen* is broader than the constitutional principle of *Bruton,* because the necessary prejudice does not depend on a failure of confrontation. If an Ohio judge knows that the state intends to use the confession of a codefendant which contains matter prejudicial to the other defendant in a joint trial, it is an abuse of discretion not to grant a severance. The emphasis in *Rosen* is on the effect of the confession on the jury. "[I]n many cases the admission of such ex parte statements creates impressions so adverse that they may not be eradicated from the minds of the members of the jury." State v. Rosen, 151 Ohio St. 339, 342, 86 N.E.2d 24 (1949).

Limitations

Bruton does not apply to bench trials where there is no jury to be misled. See State v. Doherty, 56 Ohio App.2d 112, 381 N.E.2d 960 (1978). Moreover, the codefendant's confession in *Bruton* was clearly inadmissible under the hearsay rule as to Bruton. See Bruton v. United States, 391 U.S. 123, 128 n.3 (1976). If a codefendant's confession falls within a recognized hearsay exception, such as the coconspirators exemption, Evid. R. 801(D)(2)(e), there is no confrontation violation. The United States Supreme Court later ruled that coconspirator statements automatically satisfy the reliability requirement imposed by the Confrontation Clause, Bourjaily v. United States, 483 U.S. 171 (1987), and that the unavailability of the declarant need not be established as a condition for admitting coconspirator statements. United States v. Inadi, 475 U.S. 387 (1986).

Exclusion

In addition to severance, there are several ways to avoid the *Bruton* problem. Excluding the evidence is a possibility, but a rather unattractive one from the prosecution's perspective.

Redaction

The *Bruton* problem may be avoided if the prosecution can delete (redact) all references in the confession that relate to the codefendant. See Bruton v. United States, 391 U.S. 123, 134 n. 10 (1976); State v. Rosen, 151 Ohio St. 339, 342, 86 N.E.2d 24 (1949). See also United States v. Tutino, 883 F.2d 1125, 1135 (2d Cir. 1989) ("[A] redacted statement in which the names of co-defendants are replaced by neutral pronouns, with no indication to the jury that the original statement contained actual names, and where the statement standing alone does not otherwise connect co-defendants to the crimes, may be admitted without violating a co-defendant's *Bruton* rights."), cert. denied, 493 U.S. 1081 (1990).

Redaction, however, is not always effective. "There are, of course, instances in which such editing is not possible; the references to the codefendant may be so frequent or so closely interrelated with references to the maker's conduct that little would be left of the statement after editing." ABA Standards Relating to Joinder and Severance 38 (1967). Indeed, such editing of the confession may only serve to draw attention to the object of the censorship. See Hodges v. Rose, 570 F.2d 643 (6th Cir. 1977), cert. denied sub. nom., Lewis v. Rose, 436 U.S. 909 (1978).

The United States Supreme Court sanctioned the redaction procedure in Richardson v. Marsh, 481 U.S. 200 (1987). Marsh was present during a robbery and murder. A witness testified about her conduct during the crime, indicating that Marsh, along with two others, was an active participant. The confession of her codefendant, Williams, was then admitted in evidence. This confession was redacted to omit all reference to Marsh. Indeed, it omitted all reference to anyone other than Williams and Martin, the third alleged accomplice, who was a fugitive at the time of the trial. Marsh testified in her own defense. She admitted being present at the scene but denied any prior knowledge that the crime would occur. Her testimony, however, placed her in a car with Williams and Martin just prior to the crime, and Williams's confession indicated that the crime was discussed at that time. The trial court instructed the jury that Williams's confession could be considered only when determining Williams's guilt.

The Supreme Court commented: "We hold that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to her existence." Id. at 211. In *Bruton* the codefendant's confession expressly implicated Bruton as the accomplice. In contrast, the codefendant's confession on its face did not implicate Marsh. Marsh was linked to the confession only through other evidence admitted at trial, i.e., her own testimony. The Court held that "evidentiary linkage" or "contextu-

al implication" does not present the potential for jury disregard of the limiting instruction that underlies the *Bruton* decision:

> In short, while it may not always be simple for the members of a jury to obey the instruction that they disregard an incriminating inference, there does not exist the overwhelming probability of their inability to do so that is the foundation of *Bruton*'s exception to the general rule. Id. at 208.

In addition, the Court cited the practical difficulties of adopting a different rule. A redacted confession can be reviewed prior to trial, but assessing "evidentiary linkage" prior to trial is often impossible.

The Ohio Supreme Court, in State v. Moritz, 63 Ohio St.2d 150, 407 N.E.2d 1268 (1980), held that *Bruton* should be applied to all statements that tend to incriminate a codefendant, whether or not that defendant is actually named in the statement. The United States Supreme Court in *Richardson,* however, declined to go as far as *Moritz* and declined to apply *Bruton* to a statement that was not incriminating on its face but was so only when linked with other trial testimony. In State v. Laird, 65 Ohio App.3d 113, 583 N.E.2d 323 (1989), a court of appeals followed *Richardson* and not *Moritz.*

Codefendant Testimony

The *Bruton* problem is avoided, at least in some instances, if the codefendant testifies at trial. Under these circumstances, the defendant has the opportunity to cross-examine the codefendant on the accuracy of the out-of-court statement, thereby obviating the confrontation issue. The United States Supreme Court took this position in Nelson v. O'Neil, 402 U.S. 622, 629-30 (1971): "We conclude that where a codefendant takes the stand in his own defense, denies making an alleged out-of-court statement implicating the defendant, and proceeds to testify favorably to the defendant concerning the underlying facts, the defendant has been denied no rights protected by the Sixth and Fourteenth Amendments." See also State v. Doherty, 56 Ohio App.2d 112, 381 N.E.2d 960 (1978).

The *Nelson* rationale is inapplicable where both defendants are represented by the same attorney because in such a case cross-examination of the testifying codefendant would present a conflict of interests. See Courtney v. United States, 486 F.2d 1108 (9th Cir. 1973); Holland v. Henderson, 460 F.2d 978 (5th Cir. 1972).

Interlocking Confessions

The Supreme Court first addressed the issue of interlocking confessions in Parker v. Randolph, 442 U.S. 62, 73 (1979). Unlike Bruton, Parker had also confessed. The plurality opinion in *Parker* distinguished *Bruton:* "The right protected in *Bruton* — the 'constitutional right of cross-examination, . . . has far less practical value to a defendant who has confessed to the crime than to one who has consistently maintained his innocence. Successfully impeaching a codefendant's confession on cross-examination would likely yield small advantage to the defendant whose own admission of guilt stands before the jury unchallenged." Consequently, the plurality found the *Bruton* rule inapplicable.

In 1987, the Supreme Court rejected the interlocking confession doctrine, as espoused in *Parker,* finding the introduction of a nontestifying codefendant's confession violative of the Confrontation Clause. In Cruz v. New York, 481 U.S. 186 (1987), Eulogio Cruz was tried along with his brother, Benjamin, for the death of a gas station attendant. Benjamin's confession, which implicated Eulogio, was admitted at trial.

The Court held:

> Where a nontestifying codefendant's confession facially incriminating the defendant is not directly admissible against defendant, the Confrontation Clause bars its admission at the joint trial, even if the jury is instructed not to consider it against defendant, and even if the defendant's own confession is admitted against him.
>
> This case is indistinguishable from *Bruton* with respect to those factors the Court has deemed relevant in this area: the likelihood that the instruction will be disregarded, . . . the probability that such disregard will have a devastating effect, . . . and the determinability of these facts in advance of trial . . . .

Rebuttal

In Tennessee v. Street, 471 U.S. 409 (1985), which involved a burglary-murder allegedly perpetrated by the defendant and an accomplice, the Court ruled that *Bruton* was not violated by the prosecution's use of an accomplice's statement in rebuttal. One defendant claimed that he was forced to sign a confession that mirrored that of his codefendant. The prosecution was allowed to admit the codefendant's confession for the nonhearsay purpose of illustrating the dissimilarities between the two confessions and thus to discredit the defendant's claim. Chief Justice Burger concluded that the limiting instruction adequately protected the defendant's legitimate interest in ensuring that the confession was not misused by the jury, and "unlike the situation in *Bruton,* . . . there were no alternatives that would have both assured the integrity of the trial's truth-seeking function and eliminated the risk of the jury's improper use of evidence." Id. at 415.

Since the sheriff who took both statements was available at trial for questioning, the Court ruled that a *Bruton* issue was not involved. "In short, the State's rebuttal witness against the [the defendant] was not [his accomplice], but [the sheriff]." Id. at 414.

Harmless Error

Bruton issues are subject to the harmless error doctrine. See Harrington v. California, 395 U.S. 250 (1969) (the other evidence against the accused was so overwhelming that the denial of the constitutional right in that instance was harmless); State v. Moritz, 63 Ohio St.2d 150, 407 N.E.2d 1268 (1980); State v. Utsler, 21 Ohio App.2d 167, 255 N.E.2d 861 (1970); State v. Parsons, 18 Ohio App.2d 123, 123 n. 1, 247 N.E.2d 482 (1969).

CAPITAL CASES

Where two or more persons are jointly indicted for a capital offense, Criminal Rule 14 provides that severance is automatic. In effect, this provision presumes prejudice in joint trials of capital offenses. Joinder of defendants requires a motion by the prosecution or one of the defendants and approval by the court for good cause shown. The burden of establishing good cause rests on the prosecutor. See State v. Henry, 4 Ohio St.3d 44, 446 N.E.2d 436 (1983); State Abbott, 152 Ohio St. 228, 89 N.E.2d 147 (1949); State v. Fields, 29 Ohio App.2d 154, 279 N.E.2d 616 (1971). This provision follows R.C. Section 2945.20 and thus, cases interpreting that provision are still persuasive authority.

Good cause for joinder in capital cases must meet a

higher standard than that usually applied in support of joint trials. As the Ohio Supreme Court noted in State v. Abbott, 152 Ohio St. 228, 236, 89 N.E.2d 147 (1949):

> [G]ood cause must necessarily be some operative factor not present in every case of joint indictments of defendants in capital cases. For instance, the additional time and labor required of the state or court, or the expense to the state, made necessary by separate trials, cannot be assigned or considered as good cause.

See also State v. Dingledine, 28 Ohio Abs. 685, 687-88, 33 N.E.2d 660, 662-63 (App. 1939) (crowded dockets insufficient to establish good cause; saving time and money insufficient; separate trials would cause delay which might deprive a defendant of a speedy trial are insufficient), appeal dismissed, 135 Ohio St. 251, 20 N.E.2d 6367 (1939).

Administrative and economic reasons for a joint trial were also rejected in State v. Richardson, 39 Ohio Abs. 608, 613, 54 N.E.2d 160 (App. 1943). The court went on to hold, however, that joinder was proper under the circumstances of that case because it "enable[d] the jury to have a clearer insight into the testimony and enable[d] it to arrive more intelligently at a proper conclusion." See also State v. Jenkins, 76 Ohio App. 277, 64 N.E.2d 86 (1944) (joint trial permitted where it appears that all the defendants had planned and executed the crime and that each had so confessed. The defendants are not thereby deprived of a fair trial where the court carefully instructs the jury concerning the application of the confessions), appeal dismissed, 144 Ohio St. 638, 60 N.E.2d 182 (1945).

The Ohio Supreme Court has held that the joint trial of codefendants in an aggravated murder case may be ordered provided the mandates of Rule 14 and R.C. 2945.20 are strictly observed. State v. Henry, 4 Ohio St.3d 44, 446 N.E.2d 436 (1983). See also State v. Johnson, 31 Ohio St.2d 106, 285 N.E.2d 751 (1972) (Absent any necessity demonstrated in the record for a defendant's trial to run seriatim with the trials of codefendants, a defendant is not denied due process where the state, in order to insure a trial free from prejudice, conducts separate murder trials simultaneously in different courtrooms.).

Failure to object to joinder in capital cases may constitute a waiver. See State v. Williams, 85 Ohio App. 236, 88 N.E.2d 20 (1947); State v. Bohannon, 64 Ohio App. 431, 28 N.E.2d 1010 (1940).

MOTION TO SEVER

A motion for relief from prejudicial joinder pursuant to Criminal Rule 14 is considered a pretrial motion under Rule 12(B)(5). Therefore, the motion must be raised before trial or the issue is deemed waived unless the defendant can show good cause for the court to grant relief from the waiver. Furthermore, a request by the defendants for separate trials is a prerequisite to appeal the issue of failure to order separate trials. State v. Henry, 4 Ohio St.3d 44, 446 N.E.2d 436 (1983).

In determining whether the confession of one codefendant implicates another, Rule 14 authorizes the court to order the prosecutor to deliver to the court any statements made by any of the defendants which are to be introduced at trial. The basis for such an inspection is Criminal Rule 16(B)(1)(a) which gives the defendant the right to inspect any relevant statements made by the defendant or his codefendants that are in the possession of the state. This rule of discovery provides a great advantage to the defendant desiring severance. Without access to a codefendant's confession, provided for in Rule 16(B)(1)(a), the showing of prejudice necessary for severance under Rule 14 might be exceedingly difficult.

REFERENCES

2 Katz & Giannelli, Baldwin's Ohio Practice Criminal Law ch. 58 (1996).

2 LaFave & Israel, Criminal Procedure § 17.3 (1985).